

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34423

TRACY PERCHELL HOWARD,)	2008 Unpublished Opinion No. 725
)	
Petitioner-Appellant,)	Filed: December 3, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Gem County. Hon. Renae J. Hoff, District Judge.

Order denying petition for post-conviction relief, affirmed.

Tracy Perchell Howard, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Chief Judge

Tracy Perchell Howard appeals from the denial of his petition for post-conviction relief. We affirm.

I.

BACKGROUND

In 2004, Howard was convicted of felony domestic battery and burglary stemming from an incident in his wife's home. This Court affirmed his sentence on direct appeal, *State v. Howard*, 2005, Docket No. 30883 (Ct. App. June 15, 2005) (unpublished), after which Howard filed a *pro se* petition for post-conviction relief.

In his petition, Howard alleged, among other claims, that he received ineffective assistance of counsel because his public defender failed to advise him of all available defenses to the crimes for which he was charged. The district court held an evidentiary hearing. Howard did not, however, address the merits of his petition by presenting evidence. Ultimately, the court denied Howard's petition, determining he had failed to establish ineffective assistance of

counsel. Howard appeals, challenging the district court's ruling that counsel was not ineffective, and for not allowing him to conduct discovery during the post-conviction process.¹

II.

DISCUSSION

A. Ineffective Assistance of Counsel

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). As with a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990); *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell*, 118 Idaho at 67, 794 P.2d at 656; *see also Storm v. State*, 112 Idaho 718, 720, 735 P.2d 1029, 1031 (1987). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 764 P.2d 439 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

Howard argues that the district court erred by determining he failed to establish ineffective assistance of counsel. A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray*, 121 Idaho at 924-25, 828 P.2d at 1329-30. To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient, and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the

¹ Howard does not contest all of the district court's rulings on appeal. Issues not raised on appeal are considered waived. *Murillo v. State*, 144 Idaho 449, 453 n.3, 163 P.3d 238, 242 n.3 (Ct. App. 2007). Therefore, we limit our discussion to only those issues which are supported by argument and authority. *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996).

burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id.* at 761, 760 P.2d at 1177. Where, as here, the defendant was convicted upon a guilty plea, to satisfy the prejudice element, the claimant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006); *see also Hill v. Lockhart*, 474 U.S. 52, 56 (1985). This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

Howard asserts he was coerced into pleading guilty by his defense attorney because his attorney failed to inform him of defenses available to the charges. Specifically, he alleges that he was not a household member of his estranged wife, Wanda Brock, a defense to the domestic violence charge, and that the information was insufficient to charge kidnapping and attempted kidnapping. Had he been informed of these defenses, Howard claims he would have refused to plead guilty and would have insisted on going to trial.

Howard insists that he was not a household member of Brock, and therefore could not have committed felony domestic violence. The Idaho Legislature defines the term household member for purposes of the domestic violence statutes to mean "a person who is a spouse, former spouse, or a person who has a child in common regardless of whether they have been married or a person with whom a person is cohabiting, whether or not they have been married or have held themselves out to be husband or wife." I.C. § 18-918(1)(a). Howard and Brock were married at the time of the incident, making him Brock's spouse and her household member. Consequently, there was no household member defense and no ineffective assistance of counsel exists on this basis.

Howard also argues that the information was insufficient to charge kidnapping and attempted kidnapping, therefore his attorney was deficient for recommending that he accept the dismissal of those charges as part of the plea bargain because the state could not have convicted him at trial. Kidnapping is defined as

Every person who willfully: 1. Seizes, confines, inveigles or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within this state, or to be sent out of this state, or in any way held to service or kept or detained against his will.

I.C. § 18-4501. The information charging Howard alleged,

That the Defendant, Tracy Perchell Howard, on or about the 9th day of October, 2003, in the County of Gem, State of Idaho, did willfully confine Wanda Marie Brock, against her will, in the bathroom of her home, by use of force, within the State of Idaho, in violation of Idaho Code § 18-4501, Kidnapping, a Felony.

Because the information does not include the word “secretly,” Howard asserts that the information only charges the crime of false imprisonment. However, the word “secretly” in the statute applies only to the phrase “confined or imprisoned within this state.” *State v. Evans*, 72 Idaho 458, 461, 243 P.2d 975, 978 (1952). The information did not allege that Howard confined or imprisoned Brock within the state. Rather, the information alleged that Howard confined Brock against her will. In this instance, secrecy is not required. The information further alleged in the charge of attempted kidnapping that Howard was interrupted while in the process of confining Brock against her will. Thus, there was no error in the charging of kidnapping and attempted kidnapping and likewise no ineffective assistance of counsel exists on this basis.

Because Howard has not established any defenses to the charges brought against him, he failed to establish ineffective assistance of counsel by a preponderance of the evidence. Therefore, the district court did not err by denying Howard’s petition after an evidentiary hearing.

B. Discovery in Post-Conviction Proceedings

Howard’s final claim on appeal is that the district court erred by refusing to allow him to investigate his claims further through the discovery process. Idaho Criminal Rule 57(b) directs that “the provisions for discovery in the Idaho Rules of Civil Procedure shall not apply to the proceedings [of the Uniform Post-Conviction Procedures Act] unless and only to the extent ordered by the trial court.” The decision to authorize discovery during post-conviction relief is a matter left to the sound discretion of the district court. *Raudebaugh v. State*, 135 Idaho 602, 605, 21 P.3d 924, 927 (2001); *Fields v. State*, 135 Idaho 286, 291, 17 P.3d 230, 235 (2000). Unless discovery is necessary to protect an applicant’s substantial rights, the district court is not required to order discovery. *Raudebaugh*, 135 Idaho at 605, 21 P.3d at 927. In order to be granted discovery, a post-conviction applicant must identify the type of information that he may obtain

through discovery that could affect the disposition of his application for post-conviction relief. *Aeschliman v. State*, 132 Idaho 397, 402, 973 P.2d 749, 754 (Ct. App. 1999). Specifically, an applicant must show the areas into which he wishes to conduct discovery and why those areas are necessary to protect his fundamental interests. *Id.* at 403, 973 P.2d at 755.

Howard identified two specific areas for discovery: testimony relating to his status as a household member of Brock, and testimony regarding whether he acted in self-defense against Brock. As previously discussed, Howard is a household member of Brock by legislative definition, and therefore discovery was not necessary in this area. The testimony Howard sought regarding self-defense was based entirely on statements he made to a potential witness. The information was already within his possession; it was, in fact, in his possession at the time he entered his guilty plea. Therefore discovery was not necessary to protect his fundamental interests. The district court did not abuse its discretion by denying Howard discovery because it was not necessary to protect his substantial rights.

III. CONCLUSION

The district court did not err by denying Howard's petition for post-conviction relief. Howard failed to prove by a preponderance of the evidence that his attorney was ineffective and thereby coerced his guilty plea. Also, the district court did not abuse its discretion by denying Howard's requests for discovery. The information Howard sought was not necessary to protect his substantial rights. The order of the district court denying Howard's petition for post-conviction relief is affirmed.

Judge LANSING and Judge PERRY **CONCUR.**